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Teddy Gerald Hyden v. Commonwealth of Kentucky

Appellant's Brief 1975-SC-1080

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APPELLANT'S BRIEF

547 SW2d 451

SUPREME COURT OF KENTUCKY

FILE NO. 75-1080

TEDDY GERALD HYDEN — APPELLANT

V.

BRIEF OF APPELLANT

COMMONWEALTH OF KENTUCKY — APPELLEE

Appeal from the Jefferson Circuit Court
Criminal Branch, Third Division
George H. Kunzman, Judge

Thomas E. Clay by 2RB
THOMAS E. CLAY
ASSISTANT DISTRICT DEFENDER
OFFICE OF THE JEFFERSON DISTRICT
PUBLIC DEFENDER
1000 REPUBLIC BUILDING
LOUISVILLE, KENTUCKY 40202
ATTORNEY FOR APPELLANT,
TEDDY GERALD HYDEN

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
DEPUTY PUBLIC DEFENDER
OF COUNSEL

This is to certify that a copy of this brief has been served on:

Hon. George H. Kunzman, Judge
Hon. Robert Stephens, Attorney General
Hon. David L. Armstrong, Commonwealth Attorney

Thomas E Clay by 2RB
THOMAS E. CLAY

TABLE OF CONTENTS AND AUTHORITIES

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STATEMENT OF THE QUESTION PRESENTED

DID THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON DEFENSE OF RENUNCIATION EFFECTIVELY STRIP THE APPELLANT OF HIS DEFENSE UNDER THE KENTUCKY PENAL CODE KRS 506.020 AND DEPRIVE HIM OF A FAIR TRIAL?

STATEMENT OF THE CASE

STATEMENT OF THE NATURE OF THE PROCEEDINGS

The appellant, Teddy Gerald Hyden, was indicted by the Jefferson County Grand Jury on March 27, 1975, and charged with one count of robbery in the first degree under KRS 515.020(1b), and a second charge of removing the serial number of a pistol under KRS 514.120(2) (Transcript of Record, hereinafter referred to as TR, page 2). At court held June 12, 1975, the second charge was dismissed on the motion of the Commonwealth, and the appellant was tried by a jury and convicted of attempted robbery (TR 3). Pursuant to the recommendation of the jury, judgment was entered on July 23, 1975, imposing a sentence of five years confinement in the penitentiary (TR 6-7). From this judgment an appeal has been duly perfected to this court. A notice of appeal was filed on August 1, 1975 (TR 7-8). A motion for an extension of time for filing the record on appeal was granted on September 17, 1975, (TR 11). The record on appeal was subsequently duly filed in this court.

STATEMENT OF THE FACTS

The Commonwealth produced Lloyd Z. Roadcap, who testified that appellant was one of two men who entered his business place, Garden Acres Pharmacy, around 8:00 on the evening of February 4, 1975, (Transcript of Evidence, hereinafter TE, page 9). Mr. Roadcap said that one of these men, Omar Taylor, came quickly to the rear of the store, where Mr. Roadcap was behind the prescription counter, while the appellant remained 12-16 feet inside the front entrance (TE 10). Although this distance varies throughout the testimony, Mr. Roadcap's testimony establishes that the appellant never came more than one half of the distance between the prescription area and the front door (TE 15). When Mr. Taylor got to the rear of the store, he pulled a gun and pointed it at Mr. Roadcap. At this time Mr. Taylor was confronted by Police Detective Riddle, who was hiding in the rear of the store. When Det. Riddle told Mr. Taylor to drop his gun, Mr. Taylor whirled around and aimed it at the detective, who shot him (TE 11). Mr. Roadcap testified that, after Mr. Taylor had been shot, he saw the appellant turn and run out of the store (TE 11).

On cross-examination, Mr. Roadcap said that his attention was completely on Mr. Taylor as he stood before him, was shot, and fell to the ground. Yet, he insisted that he looked up after Mr. Taylor had fallen to the ground and saw appellant turn and run (TE 14-16).

The Commonwealth also produced Detective Riddle, who testified that after he shot Mr. Taylor he looked up and saw appellant begin to flee (TE 44).

The appellant took the stand on his own behalf (TE 48-62). He testified that he met Omar Taylor on Saturday, February 1, 1975, and that Taylor asked him to help him rob the drugstore. (TE 49). Appellant thought about it and met Mr. Taylor at a bar three nights later, February 4, 1975, (TE 49). Mr. Taylor again asked appellant to help him rob the store (TE 49-50). The appellant indicated to Mr. Taylor that he did not know if he wanted to do it

or not (TE 49). Mr. Taylor and appellant then went to look at the store and returned to the bar (TE 50). Finally, upon leaving the bar, appellant went with Mr. Taylor to the store. Mr. Taylor had two pistols and ski masks ready (TE 50). Appellant entered the store with Mr. Taylor, who immediately ran to the back of the store (TE 51). Appellant promptly bacame frightened and fled the scene at that point (TE 50-51). Appellant did not hear the shot that was fired at Mr. Taylor, and he had left before it was fired (TE 52).

The prosecutor, in his cross-examination of appellant, attempted to show that appellant and Mr. Taylor went to the drug-store on the evening of February 3, 1975, the night before the robbery, in order to rob the store but did not, because the store had already closed that evening (TE 58). Appellant denied this (TE 58). On redirect examination of the appellant, defense counsel asked him if he had ever been to the drugstore prior to the night of the attempted robbery, February 4, 1975. Appellant said he had not (TE 62). On redirect examination of Mr. Raodcap, the prosecu-tor attempted to rebut the testimony of appellant whereby he denied having gone to the drugstore the night before the robbery (TE 63). Such line of questioning was objected to by the defense counsel in that it had not been extablished that Mr. Roadcap was present at the store that evening (TE 63-64). In fact, he was not (TE 65). In his closing argument, the prosecutor told the jury that appellant had gone to the store the night before the actual attempted robbery, had cased the store, and decided not to rob it that night because there was no one there (TE 77-78).

At the end of the evidence, the appellant tendered an instruction on the defense of renunciation (TE 66). This instruction was overruled by the court (TE 66).

ARGUMENT

THE FAILURE OF THE TRIAL COURT TO INSTRUCT THE JURY ON DEFENSE OF RENUNCIATION EFFECTIVELY STRIPED THE APPELLANT OF HIS DEFENSE UNDER THE KENTUCKY PENAL CODE KRS 506.020 AND DEPRIVED HIM OF A FAIR TRIAL.

In the case at bar, the appellant admitted entering the drugstore with Mr. Taylor, who had supplied him with a pistol and ski mask and whom he knew intended to rob the store. Appellant's testimony paints a picture of a man who has renounced his criminal purpose for reasons other than those prescribed in KRS 506.020(2) (a) and (b):

> I said, "No, I don't think I can do this, Omar." ...Well, when I opened the door for him he stepped in and started runnin'. And I was petrified. I didn't know what to do. I thought he was runnin' off or something. And I might have been two feet inside the door and I said, "My God, I can't do this." And I turned and grabbed the ski mask off the top of my head and threw it down. And the gun on the left side of my pants, and ran to the alley... (TE 50-51).

The defense of renunciation is a judicial and legislative recognition that people often refuse to execute their plans when confronted in potentially traumatic situations. In the realm of criminal activity, KRS 506.020 recognizes this facet of human behavior and allows potential criminals to renounce their intentions prior to completion of the crime, provided their change of heart is not motivated by those specific reasons which are incompatible with a good faith and complete renunciation. The statute reads:

> 506.020-Criminal attempt-Defense of renunciation.
> (1) In <u>any</u> prosecution for criminal attempt to commit a crime, <u>it is a defense</u> that, under circumstances manisfesting a voluntary and complete renunciation of his criminal purpose, the defendant abandoned his effort to commit the crime... (emphasis added).

The essence of renunciation is the change of the actor's intent. In determining another person's state of mind, we must, of necessity, draw conclusions based on outward appearances and actions. For that reason, the legal defense of renunciation is

judged by evaluating circumstances manifesting a voluntary change of plan. The testimony of the three witnesses summarized above shows substantial contradiction as to the circumstances and chronology surrounding the appellant's flight from the store. The appellant contends the court should have permitted him to focus the minds of the jurors on the circumstances surrounding his renunciation by appropriate instruction on that defense.

It has been the practice in Kentucky that, where the defendant admits to facts consisting of the elements of the crime, he can rely on facts and circumstances which amount to avoidance of the crime, or exonerate his criminal intent. In such cases he is entitled to instructions which clearly set out his theory of defense. Evitts v. Commonwealth, 257 Ky. 586, 78 S.W.2d 798 (1935); see also Palmore, Kentucky Instructions to Juries, 1975 ed. §1.07.

In Kohler v. Commonwealth, Ky., 492 S.W.2d 198 (1973), and Rudolph v. Commonwealth, Ky., 504 S.W.2d 340 (1974), the defendants admitted the performance of criminal activity, but defended on grounds that their actions were taken to enhance their positions as police informers and confederates. On appeal, the Court of Appeals directed that the defendants be allowed to set out their defenses in concrete form for jury consideration in order to disprove criminal intent. In light of these cases and the clear language of the Penal Code, it seems the appellant should have the opportunity to summarize and place his theory of the case squarely before the jurors.

In Mullany v. Wilbur. ____U.S.____, 95 S.Ct. 1881, ____ L.Ed.2d ____ (1975), the Supreme Court held that the state must prove every element of the offense, including intent, beyond a reasonable doubt as a matter of due process of law. It likewise held that the prosecution had to prove beyond a reasonable doubt the absence of such circumstances that would give rise to a defense.

This decision seems particularly appropriate to the Penal Code definition of criminal attempt in KRS 506.010 and renunciation in KRS 506.020. It would seem that the Commonwealth,

in the case at bar, must permit the trier of fact to decide not only the elements of the offense, but also the existence or the absence of those situations which give rise to a defense. Such argument draws support from Palmore, Kentucky Instructions to Juries, 1975 ed., comment to §9.01.

> For the principal criminal attempt offense, it is necessary that the offender intend to commit a criminal offense and that he take a substantial step towards its completion. This later requirement is made meaningful through a statuatory definition of substantial step.
>
> Occassionally, a third element will have to be added to the definition of criminal attempt. In KRS 506.020, the Penal Code creates a "defense" of voluntary renunciation to a charge of criminal attempt. If a defendant raises such an issue, the state has the burden of proof, therefore this element would be added to the [instruction on attempt] as a fact to be negated.

Finally, not only was the appellant forbidden from articulating his theory of defense for the jury's consideration, but he had to endure an allegation by the prosecutor during his closing argument that was not supported at all by the evidence. The prosecution claimed that the appellant and Mr. Taylor had gone to the drugstore that night of February 3 and cased it, that someone noticed them, that the pair felt they were suspected and left for the night, and that a stakeout was arranged as a result (TE 77-78). The prosecutor attempted to develop this hypothesis during the trial through redirect examination of Mr. Roadcap (TE 63-65). Since it was not established that Mr. Roadcap was even at the store when this incident allegedly happened, defense counsel objected. In fact, Mr. Roadcap was not present that night (TE 65). This allegation, unsupported by the record, was intended to rebut the appellant's defense of renunciation by creating a picture of him as a professional bandit. Such a person is much more likely to renounce a robbery for the reasons prescribed in KRS 506.020(2)(a) and (b) than for legitimate qualms of conscience. The prosecutor then asked the jury to make a connection between the appellant's transient lifestyle and the advantage such a lifestyle affords to those robbers who flee town after every job (TE 79-80).

The appellant then not only was stripped of using his legal defense, but had to withstand incompetent statements which tended to negate his testimony in the minds of the jurors.

CONCLUSION

For the reason and authorities stated herein, the conviction of the appellant should be reversed, and the case remanded for a new trial.

Thomas E. Clay by 2RD
THOMAS E. CLAY
ASSISTANT DISTRICT DEFENDER
Office of the Jefferson District
Public Defender
1000 Republic Building
Louisville, Kentucky 40202
ATTORNEY FOR APPELLANT
TEDDY GERALD HYDEN

Terrence R. Fitzgerald
TERRENCE R. FITZGERALD
DEPUTY PUBLIC DEFENDER
OF COUNSEL

Kenneth Allen, by 2.R.D.
KENNETH ALLEN
Kenneth Allen, by 2.R.D.
KENNETH ALLEN
LEGAL INTERN